

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 93-241
DARRELL BRYAN)	File No. BPH-920109MA
SBH PROPERTIES, INC.)	File No. BPH-920123MD
)	
)	

For Construction Permit for
New FM Channel 276A
Tusculum, Tennessee

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APR 28 1994

To: Honorable John M. Frysiak
Administrative Law Judge

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OPPOSITION TO
MOTION FOR ACCEPTANCE OF SUPPLEMENT TO
OPPOSITION TO SECOND MOTION TO ENLARGE ISSUES

SBH Properties, Inc. ("SBH") by counsel, pursuant to Sections 1.4 and 1.294 of the Commission's Rules, herewith submits its opposition the "Motion for Acceptance of Supplement to Opposition to Second Motion to Enlarge Issues," filed by Darrell Bryan ("Bryan") on April 18, 1994. In support whereof the following is shown:

1. By his Motion Bryan seeks leave to supplement his March 14, 1994 Opposition to SBH's Second Petition to Enlarge Issues. Bryan acknowledges (Motion at paras. 1-2) that the purpose of his Supplement is to address certain matters raised in SBH's March 31, 1994 Reply to his Opposition, not to address the arguments advanced in SBH's Second Petition to Enlarge. Accordingly, Bryan's "Supplement" is in reality a further response to SBH's

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Reply. As such, Bryan's Supplement constitutes an attempt to have the last word in this matter, when the Commission's procedures provide that the petitioner have the final argument.

2. In support of his Motion Bryan contends that, while "additional pleadings are not normally accepted," his Supplement should be accepted because SBH has made serious allegations in its Reply, to which Bryan has not had an opportunity to respond. However, it is by design that the Commission permits the petitioner to have the final word in attempting to establish a prima facie case warranting issue enlargement. Furthermore, it is always the case under this scheme that the petitioner will raise arguments to which no response is permitted. However, so long as the petitioner does not raise new, independent allegations, but simply advances arguments based upon the applicant's opposition, this is entirely proper.

3. Here, each of SBH's allegations which Bryan seeks to address by means of his Supplement were properly and directly related to the contentions advanced and evidence presented by Bryan in his previously submitted Opposition. Thus, SBH's Reply raised issue with the reliability of the tower "quote" Bryan had obtained from American Aviation, Inc. However, this provides no basis for any further presentation by Bryan, who should have anticipated and addressed these issues in his Opposition. Indeed, given the fact that SBH had challenged his ability to construct a tower for the unrealistically low cost proposed, Bryan's opposition was directed toward demonstrating that the proposed

cost was realistic. In so doing Bryan should have recognized in order to convincingly demonstrate the reliability of his estimate, he not only needed a "quote," but needed to demonstrate the qualifications of the person providing the quote, especially where, as here, those qualifications were in no manner readily apparent. That he failed to do so does not provide any basis for the submission of any supplement or further response.

4. Similarly, SBH's comments regarding the March 2, 1994 equipment proposal which Bryan obtained from Hall Electronics were properly and directly related to the contentions advanced by Bryan in his Opposition in reliance upon that equipment proposal. Given the fact that SBH had already challenged Bryan's reliance upon used equipment, he was certainly on notice to support his Opposition with an equipment proposal which distinguished new from used equipment. Instead of doing so, however, Bryan relied upon an equipment proposal which designated only 2 items as "new", an approach which, SBH noted, appeared to be consistent with Hall Electronics policy in advertising equipment prices, i.e., designating items which are new, as "new," while items not so designated are understood to be used and reconditioned. Thus, Bryan was not only on notice that the new or used nature of the equipment he was proposing was at issue, but he knew that Hall Electronics is known as a dealer in used and reconditioned equipment and that the equipment proposal it had provided identified only 2 items as "new," despite his contentions to the contrary. Once again, Bryan was on notice that the new cost of

the equipment he had proposed was at issue and his failure to anticipate and address these matters in his Opposition provides no basis for the submission of any supplement or further response.

5. Finally, Bryan seeks to supplement his Opposition to cure his failure to support his Opposition by sworn testimony, which he claims was inadvertant. To the extent that Bryan attempts to remedy this deficiency through the submission of a statement under penalty of perjury, this portion of his Supplement does appear to be directed merely at supplementing his previously filed Opposition. However, he fails to offer any explanation for his almost 3 week delay in doing so.

6. Should the Presiding Judge conclude that good cause has been shown for acceptance of Bryan's Supplement and that it should be accepted, SBH requests that it be given reasonable time to prepare and file a Reply to Bryan's Supplement.

WHEREFORE, premises considered, the "Motion for Acceptance of Supplement to Opposition to Second Motion to Enlarge Issues," filed by Darrell Bryan on April 18, 1994, should be DENIED.

Respectfully Submitted

SBH PROPERTIES, INC.

By: 

Timothy K. Brady
Its Attorney

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April 27, 1994

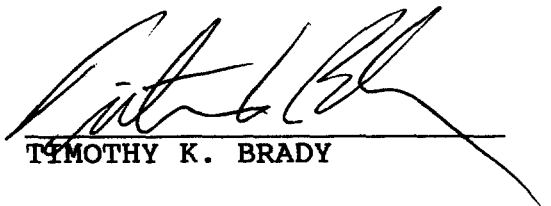
CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 26th day of April, 1994, served a copy of the foregoing Opposition to Motion for Acceptance of Supplement by First Class mail, postage prepaid upon the following:

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